No. 11545

In the United States Circuit Court of Appeals for the Ninth Circuit

Z. E. EAGLESTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

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SUBJECT INDEX

	Page
Jurisdictional Statement	1
Statement of Facts	1
Evidence as to Who Struck the First Blow—Progress of Fight	1
Essential Evidence as to the Character of the Alleged Weapon was not Withheld From the Grand Jury	3
Photographs Taken of Rowley's Head	5
Argument	6
First Point Raised: 1. The Trial Court Did Not Err in Giving to the Jury Instruction No. 4D	6
(a) That portion of Instruction 4D which reads: "It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States" (R. 11) is a correct statement of the law	6
(b) Instruction 4D does not wrongfully assume that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists inasmuch as these facts were established by uncontradicted evidence and were admitted by appellant	8
Second Point Raised: 2. The Trial Court Did Not Err in Giving Instruction No. 4 to the Jury	12
Third Point Raised: 3. The Trial Court Did Not Commit Error in Failing to Instruct the Jury on the Law of Self-Defense	16
Fourth Point Raised: 4. The Court Did Not Err in Allowing Photographs of the Injured Man's Head to be Introduced in Evidence	19
Fifth Point Raised: 5. The Court Did Not Abuse Its Discretion in Overruling Appellant's Motion for New Trial	31
Sixth Point Raised: 6. The Indictment Stated Facts Sufficient to Constitute a Crime and the Trial Court had Jurisdiction Over the Offense Charged	32
(a) The Sufficiency of the Indictment	32
(b) The Sixth Amendment	36
(c) It is Presumed That the Defendant is Innocent of What is Intended to be Proved Against Him	40
(d) An Indictment Pleading Only the Words of the Statute is Sufficient in the Case at Bar	42
(e) The United States Attorney Did Not Withhold Evidence From the Grand Jury to the Prejudice of the Defendant, and the Indictment Returned Was Valid and Sufficient in Every Respect	54
Conclusion	59

TABLE OF AUTHORITIES

Cases: Page

Adams v. *State*, 75 So. 641 — 7, 17
Andrews v. *U. S.*, 224 Fed. 418 — 14
Allred v. *U. S.*, 146 F. 2d 193 — 30
Alvarado v. *U. S.*, 9 F. 2d 385 — 14, 54
Alyea v. *State*, 86 N. W. 1066 — 52
Bailey v. *State*, 24 Ala. App. 354; 135 So. 407 — 20
Banks v. *U. S.*, 147 F. 2d 628 — 32
Beauchamp v. *U. S.*, 154 F. 2d 413 — 36
Berenbein v. *U. S.*, 164 F. 2d 679 — 15
Bob v. *U. S.*, 106 F. 2d 37 — 11
Bone v. *State*, 43 Okla. Cr. 360; 279 P. 363 — 20
Boyd v. *U. S.*, 271 U. S. 104 — 15
Cabiale v. *U. S.*, 276 Fed. 769 — 14
Canterbury v. *State*, 43 So. Rep. 678 — 46
Carson v. *State*, 230 S. W. 997; 89 Tex. Cr. 342 — 7, 17
Castillo v. *State*, 124 S. W. 2d 146 — 53
Ching v. *U. S.*, 264 Fed. 639 — 14
Coagara v. *Territory of Hawaii*, 152 F. 2d 933 — 35
Coffin v. *U. S.*, 156 U. S. 432 — 54
Coleman v. *U. S.*, 3 F. 2d 243 — 14
Commonwealth v. *Collberg*, 119 Mass. 350; 20 Am. Rep. 328 — 6
Commonwealth v. *Remley*, 77 S. W. 2d 784; 257 Ky. 209 — 8
Crampton v. *U. S.*, 16 F. 2d 231 — 10
Dunbar v. *U. S.*, 156 U. S. 185 — 40
Dunn v. *State*, 124 So. 744; 23 Ala. App. 321 — 7, 17
Evans v. *U. S.*, 153 U. S. 584 — 32
Feigin v. *U. S.*, 3 F. 2d 866 — 14
Fippin v. *U. S.*, 162 F. 2d 128 — 35
Frederick, et al. v. *U. S.*, 163 F. 2d 536 — 14, 35, 37
Freihage v. *U. S.* 56 F. 2d 127 — 31
Frisbie v. *U. S.*, 150 U. S. 160 — 54
Garza v. *State*, 102 Tex. Cr. 241; 277 S. W., 382 — 20
Garza v. *U. S.*, 159 F. 2d 413 — 49, 50
Girson v. *U. S.*, 88 F. 2d 358 — 19
Goldstein v. *U. S.*, 73 F. 2d 804 — 31
Goon v. *U. S.*, 15 F. 2d 841 — 19
Grebe v. *State*, 112 Nebr. 759; 201 N. W. 142 — 9
Hagen v. *U. S.*, 268 Fed. 344 — 11
Hagner v. *U. S.*, 285 U. S. 427 — 36
Hargreaves v. *U. S.*, 75 F. 2d 68 — 14
Hopper v. *U. S.*, 142 F. 2d 181 — 37
Humes v. *U. S.*, 170 U. S. 210 — 18
Jackson v. *State*, 19 Ala. App. 399; 97 So. 260 — 20
Jackson v. *U. S.*, 102 Fed. 473 — 42
Janovich v. *State*, 32 Ariz. 175; 256 P. 359 — 23
Jarabo v. *U. S.* 158 F. 2d 509 — 19, 23
Jewett v. *U. S.*, 100 Fed. 832 — 54
Joyce v. *U. S.*, 294 Fed. 665 — 14
Kearnes v. *U. S.* 27 F. 2d 854 — 14

Cases—Continued

	Page
Kempe v. *U. S.* ,160 F. 2d 406	19, 35
Kramer v. *U. S.*, 166 F. 2d 515	35, 37
Lewey v. *State*, 182 So. 98; 28 Ala. App. 245	7, 17
Lonergan v. *U. S.*, 98 F. 2d 591	30
Lovenberg v. *U. S.* 156 F. 2d 22	37
Lowrey v. *U. S.*, 161 F. 2d 30	37
Madden v. *U. S.*, 20 F. 2d 289	22
Maron v. *U. S.*, 18 F. 2d 218	30
May v. *U. S.*, 157 Fed. 1	10
Melvin v. *U. S.*, 252 Fed. 449	32
Mullendore v. *State*, 191 S. W. 2d 149	9
Newton v. *U. S.*, 162 F. 2d 795	35
Norcott v. *U. S.*, 65 F. 2d 913	10
Ochoa v. *U. S.*, 167 F. 2d 341	34, 37, 40
Parsley v. *State*, 148 Ark. 518; 230 S. W. 587	9
Paschal v. *State*, 30 Ga. App. 22; 116 S. E. 899	20
People v. *Dunn*, 177 P. 2d 553	23
People v. *Ferlin*, 203 Cal. 587; 265 P. 230	23
People v. *French*, 12 Cal. 2d 720; 87 P. 2d 1014	9
People v. *Goodwin*, 9 Cal. 2d 711; 72 P. 2d 551	23
People v. *Harris*, 219 Cal. 727; 28 P. 2d 906	23
People v. *Lathrop*, 49 Cal. App. 63; 192 P. 722	20
People v. *Macias*, 174 P. 2d 895	48
People v. *Manning*, 320 Ill. App. 143; 50 N. E. 2d 118	20, 22
People v. *Moore*, 57 N. E. 2d 511	51
People v. *Oppenheimer*, 156 Cal. 733; 106 P. 74	48
People v. *Petters*, 84 P. 2d 54	48
People v. *Russo*, 133 Cal. App. 468; 24 P. 2d 580	23
People v. *Shaver*, 7 Cal. 2d 586; 61 P. 2d 1170	22
People v. *Thal*, 61 Cal. App. 48; 214 P. 296	11
People v. *Weir*, 102 P. 539	46
Peterson v. *U. S.*, 4 F. 2d 702	10
Phelps v. *U. S.*, 160 F. 2d 626	15, 37
Phelps v. *U. S.*, 160 F. 2d 858	60
Raffour v. *U. S.*, 284 Fed. 720	14
Rasmussen v. *U. S.*, 8 F. 2d 948	31
Robison v. *City of Decatur*, 32 Ala. App. 654; 29 So. 2d 429	10
Rohrback v. *Pullman's Palace Car Co.*, 166 Fed. 797	9
Rourbay v. *U. S.*, 115 F. 2d 49	31
Russell v. *State*, 165 So. 256	7, 17
Shepard v. *U. S.*, 236 Fed. 73	10
Simpson v. *U. S.*, 289 Fed. 188	30
Sistrunk v. *U. S.*, 162 F. 2d 188	15
Skiskowski v. *U. S.*, 158 F. 2d 177	19
Smith v. *U. S.*, 41 F. 2d 215	14
Sparks v. *U. S.*, 90 F. 2d 61	51
Speak v. *U. S.*, 161 F. 2d 562	38
Spevak v. *U. S.*, 158 F. 2d 594	19
Springer v. *U. S.*, 148 F. 2d 411	19
State v. *Allen*, 246 S. W. 946	20

Cases—Continued

	Page
State v. *Brown*, 165 S. W. 2d 420	9
State v. *Compton*, 31 S. D. 430; 205 N. W. 31	22
State v. *Cooler*, 112 S. C. 95; 98 S. E. 845	9
State v. *Cunningham*, 144 P. 2d 303	27
State v. *Darrah*, 92 P. 2d 143	11
State v. *Dennis*, 177 Ore. 72; 159 P. 2d 839	23
State v. *Eggleston*, 161 Wash. 486; 297 P. 162	23
State v. *Henggeler*, 312 Mo. 15; 278 S. W. 743	20
State v. *Johnson*, 23 Wash. 2d 751; 162 P. 2d 440	20
State v. *Jones*, 173 P. 2d 960	9
State v. *Knight*, 289 P. 1053	53
State v. *McDonie*, 89 W. Va. 185; 109 S. E. 710	20
State v. *Maggert*, 209 P. 989	52
State v. *Miller*, 231 Iowa 863; 2 N. W. 2d 290	9
State v. *Nelson*, 162 Ore. 430; 92 P. 2d 182	22, 23, 24
State v. *Newman*, 128 N. J. Law 82; 24 A. 2d 206	9
State v. *Payne*, 25 Wash. 2d 407; 171 P. 2d 227	23
State v. *Quong*, 8 Idaho 91; 67 P. 491	20
State v. *Roe*, 7 Voyce 95; 103 A. 16	9
State v. *Sims*, 31 So. Rep. 906	45
State v. *Smith*, 196 Wash. 534; 83 P. 2d 749	23
State v. *Vane*, 178 P. 456; 105 Wash. 421	11
State v. *Walsh*, 72 Mont. 110; 232 P. 194	22
State v. *Whitzell*, 175 Wash. 146; 26 P. 2d 1049	22
State v. *Williams*, 50 Nev. 271; 257 P. 619	22
State v. *Young*, 53 Or. 227; 96 P. 1067	20
St. Clair v. *U. S.*, 154 U. S. 134	54
Sutton v. *U. S.*, 79 F. 2d 863	31
Sutton v. *U. S.*, 157 F. 2d 661	38, 39
Toi v. *U. S.*, 273 U. S. 77	15
Tokashashi v. *U. S.*, 143 F. 2d 118	11
Tatum v. *U. S.*, 110 F. 2d 555	50
Tisdale v. *State*, 199 Ind. 1; 154 N. E. 801	9
Tung v. *U. S.*, 7 F. 2d 111	14
U. S. v. *Bickford*, 168 F. 2d 26	32, 37
U. S. v. *Bushwick Mills*, 165 F. 2d 198	15, 16
U. S. v. *Hand*, 26 F. Cas. No. 15,297, 2 Wash. C. C. 435	8
U. S. v. *Josephson*, 165 F. 2d 82	35
U. S. v. *Lynch*, 11 F. 2d 198	42
U. S. v. *Monroe*, 164 F. 2d 471	15
U. S. v. *Sutter*, 160 F. 2d 754	19
U. S. v. *Wilson*, 154 F. 2d 803	10
Utley v. *U. S.*, 115 F. 2d 117	32
Vedin v. *U. S.*, 257 Fed. 550	14
Viliborghi v. *State*, 43 P. 2d 210; 45 Ariz. 275	22
Waggoner v. *U. S.*, 113 F. 2d 867	14
Watts v. *U. S.*, 161 F. 2d 511	15, 19
Wellman v. *U. S.*, 297 Fed. 925	10
Yates v. *State*, 113 So. 87; 22 Ala. App. 105	8
Young v. *State*, 38 Ariz. 298; 299 P. 682	23

Texts:	Page
4 Am. Juris., Sec. 84, p. 173	6
6 C. J. S., Sec. 91, p. 943	9
6 C. J. S., Sec. 92, p. 948	7
6 C. J. S., Sec. 116, p. 980	17, 22
6 C. J. S., Sec. 123, p. 989	20
6 C. J. S., Sec. 122, pp. 989, 990	20
23 C. J. S., Sec. 852, pp. 51, 52	22
23 C. J. S., Sec. 852, pp. 53, 54	23
23 C. J. S., Sec. 1166, pp. 702–705	10
23 C. J. S., Sec. 1169, pp. 711, 712	11
24 C. J. S., Sec. 1922, pp. 1022–1023	10
Webster's New International Dictionary, 2d Ed	8
Miscellaneous:	
Rule 30, Federal Rules of Criminal Procedure	16, 18
Rule 52 (a), Federal Rules of Criminal Procedure	12, 60

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v.

United States of America, appellee

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in appellant's opening brief (p. 1).

STATEMENT OF FACTS

Evidence as to who struck the first blow—Progress of fight

Rowley and Miles knocked on the door of appellant's room (R. 181, 427). Appellant came to the door and said, "What the hell is your hurry, can't you wait a few minutes?" (R. 248, 415). A conversation followed and they came out of the house discussing the price of an oil tank (R. 97, 191, 249).

The evidence is not clear as to whether Rowley, either in substance or in so many words, called Eagleston a liar. Eagleston so testified (R. 416). Foote, who had been financed by some unknown person in the house-moving business which required considerable heavy machinery subsequent to the commission of this crime (R. 117–118), testified contrary

to his signed statement and to his testimony at the preliminary hearing and before the grand jury, and supported Eagleston's testimony (R. 105). Rowley did not so testify (R. 175), and Miles did not hear Rowley say anything after Eagleston stated to him, "You can't call me a liar" (R. 192).

Rowley was quiet, soft-spoken and mild in his manner. He did not act at all belligerent toward Eagleston and did not appear to act in any way that would provoke Eagleston into attacking him or fighting with him (R. 251, 107–108).

It is undisputed that Eagleston challenged Rowley to fight by directing or ordering him to take off his glasses (R., Foote, 90, 96; Rowley, 175; Miles, 192, 249; Eagleston, 416). Likewise there is little, if any, dispute as to who struck the first blow. Foote testified that they both had their hands up and Eagleston hit Rowley with his right hand (R. 91, 96). Rowley testified that he took off his glasses and Eagleston hit him (R. 195). Miles stated that Eagleston then hit Rowley two or three times (R. 192, 249). Strutz related that he saw four men standing in the yard and the first blows he saw struck were when Slim hit Rowley about three times—twice on the right side and once on the left (R. 255, 278). Eagleston's testimony is in conflict with the testimony of other witnesses only to the extent that his testimony indicated that simultaneous or concurrent blows were struck (R. 417).

After Rowley was hit he staggered back up against a lumber pile in the yard (R. 192). He went to the ground and as he started to pick himself up Eagleston hit him with a rake. After he was hit with the rake

by Eagleston he slumped to the wall (R. 192). His head dropped down and he stretched right out (R. 195). There was blood on his hair and his foot was twitching (R. 195). Foote took the rake from Eagleston (R. 193) and Louis Strutz arrived (R. 193). Strutz made a remark to Eagleston that he had hit him (Rowley) hard. Eagleston said in a challenging voice, "Did you see me strike him?" (R. 256). While Foote was able to describe the events immediately prior to and subsequent to the actual striking, he did not see the blow struck. Apparently at that precise moment Foote had turned around (R. 93, 97, 99). Both Rowley and Eagleston were out of Foote's line of vision for a short period of time (R. 132). When Foote again saw Rowley he was falling the second time (R. 92, 131).

Essential evidence as to the character of the alleged weapon was not withheld from the grand jury

The indictment reflects that Howard G. Romig, M. D., Frank Rowley, Muriel Karlovich, David Z. Foote, and Louis Strutz testified before the grand jury (R. 2). The indictment charges that the offense was committed on July 30, 1946. A small piece of metal was found in the wound on Rowley's head (R. 306–307) which was returned to the FBI after the preliminary hearing (R. 307). Shortly thereafter the shovel and rake were forwarded to the Federal Bureau of Investigation laboratory in Washington, D. C. (R. 363, 365, 366). The indictment was prepared prior to October 2, 1946 (R. 34). At that time the United States Attorney had not seen either the

shovel or rake, as they had been transmitted to Washington. At the time the indictment was prepared, the United States Attorney believed the dangerous weapon used by appellant to be either a shovel or rake (R. 34). He was unable to determine which was used until approximately 12:30 on November 5, 1946 (R. 139), when certain experiments were performed in his presence (R. 35).

Some of the members of the grand jury indicated that they desired to have Howard Romig recalled and to have George Miles and Elmer Brown called as additional witnesses (R. 32). The United States Attorney left the grand jury room to have subpoenas issued and to have these witnesses brought to the Federal Building by the United States Marshal (R. 33). When he returned to the grand jury room he was advised by the foreman that a majority of members had voted against hearing additional witnesses and that they were ready to consider the next matter (R. 33, 34). Subsequent to the return of the indictment and shortly before the trial, the shovel and rake were returned from Washington, D. C., to Anchorage (R. 365).

At the trial of the case the witness Robertson testified in regard to a bloody shovel found at the scene of the crime. He made no mention of a rake (R. 55, 57, 65). He also testified that Rowley had told him in the police car that Eagleston had picked up a shovel and swung it at him and that he had felt a sharp blow on his head (R. 71). Eckert also testified concerning the finding of the bloody shovel at the crime scene but made no mention of a rake (R. 78,

79, 82, 83). Foote (R. 97, 110, 112, 122) and Brown (R. 150, 165, 167) likewise testified in regard to the finding of this bloody shovel. Chief of Police White, who was partially in charge of the investigation of this case (R. 400), had never heard anything about Eagleston striking Rowley with a rake (R. 407) although the signed statements he had witnessed specifically mentioned rake. Chief White had told Police Commissioner Ed Dodd, a former gambler (R. 400) who showed particular interest in this case (R. 400, 401), that the weapon used had been a shovel. In the complaint of a $55,000 civil action by Rowley against Eagleston it was alleged that Rowley had been struck on the head with an instrument which he had been informed was a heavy iron No. 2 shovel (R. 187). Louis Strutz at first had a slight image that the instrument used was a rake, but when he was called to the police station and shown the bloody shovel, he changed his opinion to a shovel or rake (R. 257, 269).

Dr. Davis testified that the wound on Rowley's head could have been inflicted with a shovel or with any blunt instrument (R. 377). Dr. Sogn likewise testified that the injury could have been inflicted by either a shovel or rake (R. 389).

Photographs taken of Rowley's head

Photographs of Rowley's head, taken on the afternoon of July 30, 1946, showing the nature, location, and extent of his injury, were admitted in evidence as Plaintiff's Exhibits Nos. 7, 8, 9, and 10 (R. 152, 159). They were admitted for the purpose of showing in part the condition caused by the wound suffered by

Rowley (R. 154, 157). The jury was properly cautioned and instructed regarding the purpose of the pictures and the manner in which they were to be considered by the jury (R. 157). Appellant's attorney conceded at the trial of the case that the exhibits were material to show the direct results of any blow that might have been struck (R. 154). The pictures were shown to the jury on November 5, 1946, the first day of the trial, but were not again called to the attention of the jury during the remainder of the trial.

ARGUMENT

First point raised: 1. The trial court did not err in giving to the jury instruction No. 4D

(a) That portion of Instruction 4D which reads: "It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States" (R. 11) is a correct statement of the law

It is no defense to a criminal prosecution for assault and battery that the defendant was engaged in a mutual combat. In cases of mutual combat by agreement, each participant may be prosecuted criminally.

> 4 Am. Juris., Sec. 84, p. 173.
>
> *Commonwealth* v. *Collberg,* 119 Mass. 350; 20 Am. Rep. 328.

In *Commonwealth* v. *Collberg,* the Court in its opinion stated:

> It was said by Coleridge, J., in *Regina* v. *Lewis,* 1 C. & K. 419, that "no one is justified in striking another except it be in self defense, and it ought to be known that whenever two persons

go out to strike each other and do so, each is guilty of an assault"; and that it was immaterial who strikes the first blow.

Where the accused invites the prosecuting witness to engage in a fight, self-defense cannot be set up in a prosecution for aggravated assault, the rules of mutual combat being applicable. A similar rule applies where defendant fights willingly although he did not provoke the difficulty.

6 C. J. S., Sec. 92, page 948.
Russell v. *State,* 165 So. 256 (C. C. A. Ala.).
Adams v. *State,* 75 So. 641.
Lewey v. *State,* 182 So. 98; 28 Ala. App. 245.
Dunn v. *State,* 124 So. 744, 23 Ala. App. 321.
Carson v. *State,* 230 S. W. 997, 89 Tex. Cr. 342.

A plenary examination of the entire record reveals that there were no facts raising the issue of self-defense in the trial court and Instruction 4D did not remove the issue of self-defense from the jury's consideration. The fact is undisputed that appellant deliberately provoked the fight and invited or challenged the witness Rowley to engage in mutual combat. His invitation or challenge to fight, when he told Rowley "to take off his glasses," is uncontradicted and was admitted by appellant (R., Robertson, 70; Foote, 90; Rowley, 175; Miles, 192 and 245; Eagleston, 416).

The assertion made by appellant that there is positive evidence that Rowley struck the first blow (Appellant's Brief p. 13) is not supported by the record. The positive testimony of the witnesses Robertson, Foote, Rowley, Miles, and Strutz established beyond

any doubt that appellant struck the first blow (R. Robertson, 70; Foote, 91 and 96; Rowley, 175; Miles, 192 and 249; Strutz, 255 and 278).

Appellant's own testimony shows that appellant and Rowley were sparring around, each of them trying to strike the other, and that the blows which were struck were struck concurrently or simultaneously—"And as he hit me, I hit him on the left side" (R. 417). It is apparent that appellant voluntarily and willingly engaged in mutual combat.

(b) Instruction 4D does not wrongfully assume that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists inasmuch as these facts were established by uncontradicted evidence and were admitted by appellant

Eagleston, as a witness in his own behalf, testified, "* * * we were sparring around (demonstrating)—we were hitting at one another * * *. And as he hit me, I hit him on the left side * * *" (R. 417).

The word "spar" is defined in Webster's New International Dictionary, 2nd Edition, as follows: "To box with the fists; esp. to box scientifically."

An assault is an offer or attempt to do by force a corporal injury to another, as if one strike at another with his hands or stick, and miss him.

> *U. S.* v. *Hand* (Pa.), 26 F. Cas. No. 15297, 2 Wash. C. C. 435.
>
> *Commonwealth* v. *Remley,* 77 S. W. 2d 784; 257 Ky. 209.
>
> *Yates* v. *State,* 113 So. 87; 22 Ala. App. 105.

The record reveals that appellant admitted challenging Rowley to fight and that he then willingly and voluntarily engaged in combat with Rowley during the

course of which *each* of them, according to appellant's statement, attempted to strike, and did strike the other. There is no assumption on the part of the court in this portion of Instruction 4D. The court merely instructed on facts in the case admitted by defendant and the instruction is a correct statement of the law.

It is a well recognized rule that in the absence of statute, mere words, no matter how abusive, insulting, vexatious or threatening they may be, will not justify an assault or battery.

6 C. J. S., Sec. 91, p. 943.

Rohrback v. *Pullman's Palace Car Co.*, C. C. A. Pa. (1909) 166 Fed. 797.

Parsley v. *State,* 148 Ark. 518; 230 S. W. 587.

State v. *Roe,* 7 Voyce 95, 103 At. 16.

Tisdale v. *State,* 199 Ind. 1; 154 N. E. 801.

State v. *Miller,* 231 Iowa 863; 2 N. W. 2d 290.

State v. *Brown,* 165 S. W. 2d 420.

Mullendore v. *State,* 191 S. W. 2d 149.

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State v. *Cooler,* 112 S. C. 95; 98 S. E. 845.

People v. *French,* 12 Cal. 2d 720; 87 P. 2d 1014.

State v. *Newman,* 128 N. J. Law 82; 24 A. 2d 206.

State v. *Jones,* 173 P. 2d 960.

As a general rule, an instruction is not erroneous as invading the province of the jury because it assumes the substance of facts which are admitted by the parties, especially by accused, which are agreed on by counsel, which are established clearly by uncontradicted evidence, or which are established clearly and

conclusively by the evidence beyond a reasonable doubt.

23 C. J. S., Sec. 1166, pp. 702–705.
Crampton v. *U. S.,* 16 F. 2d 231.
Wellman v. *U. S.,* 297 F. 925.
May v. *U. S.,* C. C. A. 9, 157 F. 1.
Shepard v. *U. S.,* C. C. A. 9, 236 F. 73.
Peterson v. *U. S.,* C. C. A. 9, 4 F. 2d 702.

The improper assumption of facts in an instruction will not operate to reverse where no prejudice results, as where the facts assumed are admitted, undisputed or conclusively proved; or are immaterial; or where the evidence leaves no reasonable doubt of accused's guilt; or where the finding of the facts is left to the jury.

24 C. J. S., Sec. 1922, pp. 1022–1023.
May v. *U. S.,* C. C. A. 9 (1907), 157 F. 1.
Shepard v. *U. S.,* C. C. A. 9 (1916), 236 Fed. 73.
Peterson v. *U. S.,* C. C. A. 9 (1925), 4 F. 2d 702.
U. S. v. *Wilson,* C. C. A. 2 (1946), 154 F. 2d 803.
Norcott v. *U. S.,* C. C. A. 7 (1933), 65 F. 2d 913.
Robison v. *City of Decatur,* 32 Ala. App. 654; 29 So. 2d 429.

Although certain language standing alone might appear to be on the weight of the evidence, or to convey an intimation of the court's opinion on issuable facts, the instruction will not be regarded as erroneous on this ground if an examination of the entire charge shows that no improper comment or expression of opin-

ion was in fact expressed and, likewise, although part of a charge may be open to the objection that it assumes a fact in issue, this error will be cured when the charge taken as a whole overcomes the objection. An improper comment or assumption of facts may in many instances be cured by subsequent instructions to the effect that the jury are the exclusive judges of the facts, to conclude solely on the facts, to disregard any opinion of the judge, and the like. * * *

Takahashi v. *U. S.*, C. C. A. 9, 143 F. 2d 118, 122.

Bob v. *U. S.*, C. C. A. 2, 106 F. 2d 37, 40.

Hagen v. *U. S.*, C. C. A. 9, 268 Fed. 344, 346.

23 C. J. S., Sec. 1169, pp. 711, 712.

People v. *Thal*, 61 Cal. App. 48, 214 P. 296.

State v. Darrah, 92 P. 2d 143.

State v. *Vane*, 178 P. 456; 105 Wash. 421.

A consideration of the Court's entire charge to the jury readily reveals that there is no possibility that appellant was prejudiced in any manner by Instruction 4D. This Court's attention is invited to the following portions of the trial court's instructions:

> You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.
>
> As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

802610—48——2

> During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone. (Instruction No. 11–R. 19.)
>
> You are the ones who finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom. (Instruction No. 10A–R. 19.)

Rule 52 (a), Federal Rules of Criminal Procedure, provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Although appellant boldly asserts that "unquestionably the jury was misled and appellant was prejudiced thereby," a consideration of the entire record in this case reveals that Instruction 4D was a correct statement of the law based on admitted facts, and that no prejudice resulted to the appellant by the giving thereof.

Second point raised: 2. The trial court did not err in giving Instruction No. 4 to the jury

The complete answer to appellant's second specification of error is found in Rule 30, Federal Rules of Criminal Procedure, which reads, in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter

to which he objects and the grounds of his objection.

The memorandum of exceptions to instructions (R. 22–23) reflects that no objection was made or exception taken to Instruction No. 4 as given. That this was no oversight is indicated by the fact that appellant's counsel did except to the refusal of the Court to give his requested instructions (R. 21–22), and also excepted to other instructions, namely, 4E and 4D (R. 23). The concluding remark of appellant's counsel, Mr. Grigsby, "That's all" (R. 23), is tantamount to a declaration that the remainder of the charge as given, including Instruction No. 4, was completely satisfactory to appellant's counsel.

Since no objection was made, or exception taken, to Instruction No. 4 as given by the trial court, and since no prejudice to appellant resulted by the giving of this instruction, this specification of error should not now be considered.

The record in the present case fails to reflect that the giving of Instruction No. 4 prejudiced the appellant in any manner whatsoever. There is no plain prejudicial error affecting a substantial or fundamental right of the appellant that would warrant this court to invoke Rule 52 (b), Federal Rules of Criminal Procedure. Nor is there any indication that the jury concerned themselves with anything other than the guilt or innocence of the defendant in this case.

Upon the facts reflected by the record in this case, the proper rule, and the rule consistently followed by this Court, is that an error assigned to a charge

will not be considered on review in the absence of an exception.

Frederick, et al. v. *U. S.,* C. C. A. 9, 163 F. 2d 536, 549.

Waggoner v. *U. S.,* C. C. A. 9, 113 F. 2d 867, 868.

Hargreaves v. *U. S.,* C. C. A. 9, 75 F. 2d 68, 73.

Smith v. *U. S.,* C. C. A. 9, 41 F. 2d 215, 216.

Kearnes v. *U. S.,* C. C. A. 9, 27 F. 2d 854, 855.

Alvarado v. *U. S.,* C. C. A. 9, 9 F. 2d 385, 386.

Lee Tung v. *U. S.,* C. C. A. 9, 7 F. 2d 111.

Coleman v. *U. S.,* C. C. A. 9, 3 F. 2d 243.

Feigin v. *U. S.,* C. C. A. 9, 3 F. 2d 866, 867.

Joyce v. *U. S.,* C. C. A. 9, 294 F. 665.

Raffour v. *U. S.,* C. C. A. 9, 284 F. 720.

Cabiale v. *U. S.,* C. C. A. 9, 276 F. 769.

Henry Ching v. *U. S.,* C. C. A. 9, 264 F. 639.

Vedin v. *U. S.,* C. C. A. 9, 257 F. 550, 552.

Andrews v. *U. S.,* C. C. A. 9, 224 F. 418, 419.

In the *Frederick* case, *supra,* this Court, in an opinion by Judge Garrecht, stated:

> It has long been the settled rule in Federal Courts that an instruction by the court must be excepted to in order to be availed of on appeal. This is no merely technical requirement, but is founded upon reason, justice and expediency. If the error is seasonably called to the court's attention, the court can correct it forthwith and thus obviate the necessity of a new trial. *Tucker* v. *U. S.,* 151 U. S. 164, 170. *St. Clair* v. *U. S.,* 154 U. S. 134, 153. *Lindsay*

v. *Burges,* 156 U. S. 208, 210. *Howland* v. *Beck,* 9th Cir., 56 F. 2d. 35, 37. *Brevard* v. *Tannin Co.,* 4th Cir., 288 Fed. 725, 730. *Meadows* v. *U. S.,* 4th Cir., 144 F. 2d. 751, 753.

See also:

Berenbein v. *U. S.,* C. C. A. 10, 164 F. 2d 679, 685.

U. S. v. *Monroe,* C. C. A. 2, 164 F. 2d 471, 473.

Sistrunk v. *U. S.,* C. C. A. 5, 162 F. 2d 188.

Watts v. *U. S.,* C. C. A. 5, 161 F. 2d 511, 514.

Phelps v. *U. S.,* C. C. A. 8, 160 F. 2d 858, 875.

U. S. v. *Bushwick Mills,* C. C. A. 2, 165 F. 2d 198.

Boyd v. *U. S.,* 271 U. S. 104.

Wong Tai v. *U. S.,* 273 U. S. 77.

In the case of *U. S.* v. *Bushwick Mills, supra,* the Court, in its opinion, stated:

> The Defendants were content to let the jury pass upon their guilt under the charge as given. Only after they had taken this gamble and lost, did they question the charge. Under these circumstances they should be held to have waived the errors they now assert with respect to instructions as to venue.

Both the attorneys who represented the appellant throughout his trial were from Anchorage, Alaska. It is reasonable to assume that appellant and/or his attorneys were personally acquainted with some of the members of the jury, or at least that they acquired some information concerning them during the *voir dire* examination. It is within the realm of possi-

bility that appellant and his attorneys, after studying the demeanor and appearance of the members of the jury, and perhaps having personal knowledge of the background of some of the jurors, felt that that portion of Instruction 4 which they now assign as error might have inured to their benefit. It is reasonable to assume that counsel for appellant, feeling that John Doe, a member of the jury, would be opposed to conviction, would feel that the penalty prescribed for simple assault would be sufficient punishment, and that he would, therefore, not vote for conviction of the crime of assault with a dangerous weapon. The words of Judge Swan in *U. S.* v. *Bushwick Mills, supra,* seem fitting to the situation presented here.

Third point raised: 3. The trial court did not commit error in failing to instruct the jury on the law of self defense

Here likewise, it would seem that Rule 30, Federal Rules of Criminal Procedure, cited *supra,* would completely answer the third claim of error now asserted by appellant. Inasmuch as both points two and three are covered by Rule 30, appellee, for the purpose of avoiding repetition requests the Court to reconsider the argument made under point two, insofar as it is applicable to point three.

While it is true that it is the duty of the court, whether request be made or not, to instruct on each and every essential question in the case so as to properly advise the jury of the issues, it cannot be successfully contended that there is any duty on the part of the court to instruct on an issue foreign to the record upon which there is no evidence. There was

no issue of self defense presented in the trial court. It is shown by appellant's own testimony, and by that of four other witnesses, that he provoked the altercation, that he challenged or invited Rowley to fight and that he then voluntarily and willingly engaged in the combat.

Where the accused invites the prosecuting witness to engage in a fight, self-defense cannot be set up in a prosecution for aggravated assault, and a similar rule applies where the accused fights willingly although he did not provoke the difficulty.

6 C. J. S., Sec. 92, p. 948.
Russell v. *State,* 165 So. 256.
Adams v. *State,* 75 So. 641.
Lewey v. *State,* 182 So. 98; 28 Ala. App. 245.
Dunn v. *State,* 124 So. 744, 23 Ala. App. 321.
Carson v. *State,* 230 S. W. 997, 89 Tex. Cr. 342.

No claim of self defense was made by appellant during the trial of the case. His defense as to the crime charged in the lower court was that he had not struck Rowley with any implement (R. 418).

The failure of appellant's counsel to have requested, or the court on its own motion to have instructed, on the issue of self defense was not due to an oversight or inadvertence. That appellant's attorneys gave careful thought and study to the court's charge is evidenced by the two instructions requested and the two exceptions taken to the charge as given. The court's charge shows that the same was based upon careful thought and study. If there had been any intimation of a claim of self defense disclosed by the

testimony on the trial of the case the trial judge would have properly instructed on such issue.

It seems evident that the claim of self defense, asserted for the first time on appeal, is an afterthought which did not occur until some time subsequent to the trial. While it is apparent that there is no testimony in the record upon which a claim of self defense could be based, the reason that no such claim was asserted by appellant or his counsel in the lower court is made even more apparent from matters not appearing in the record but which were visually before the jury. From the visual comparison of the physical characteristics of Eagleston and Rowley, which the jury was entitled to make, and apparently did make, a claim of self defense would have been absurd. Rowley was a man weighing approximately 185 pounds and was approximately 5 feet 8 inches in height. Eagleston, a giant of a man, weighed approximately 245 pounds and was approximately 6 feet 4½ inches in height. In addition, it is to be noted that appellant, at the time of this altercation, was backed up by two of his employees, David Foote and George Miles.

The alleged failure of a court on its own motion properly to instruct the jury will not be considered on appeal where there was no request made for such instruction nor an exception taken to the failure of the court to have so instructed and there is no error resulting in a miscarriage of justice.

Rule 30, Federal Rules of Criminal Procedure.

Humes v. *U. S.,* 170 U. S. 210, 211.

Springer v. *U. S.,* C. C. A. 9, 148 F. 2d 411, 415.

Girson v. *U. S.,* C. C. A. 9, 88 F. 2d 358, 361.

Goon v. *U. S.,* C. C. A. 9, 15 F. 2d 841, 842.

Kempe v. *U. S.,* C. C. A. 8, 160 F. 2d 406, 411.

U. S. v. *Sutter,* C. C. A. 7, 160 F. 2d 754, 757.

Watts v. *U. S.,* C. C. A. 5, 161 F. 2d 511.

Skiskowski v. *U. S.,* C. C. A. D. C., 158 F. 2d 177, 183.

Jarabo v. *U. S.,* C. C. A. 1, 158 F. 2d 509, 514.

Spevak v. *U. S.,* C .C. A. 4, 158 F. 2d 594, 598.

The language of this Court in *Goon* v. *U. S., supra,* is apropos to the court's charge in the present case, "As to the second objection, no request was made for an instruction pointed to the theory of the defense. *The Instructions covered the law of the case. They were judicial, dispassionate and fair to the defense.*" [Italics supplied.]

The court's charge, when considered in its entirety, correctly instructed the jury on each essential question presented by the evidence. There is no idication that any substantial right of appellant was affected and this asserted claim of error should not now be considered.

Fourth point raised: 4. The court did not err in allowing photographs of the injured man's head to be introduced in evidence

For the purpose of showing the nature and character of the injuries sustained, it is competent to prove the physical condition of the person assailed at the time of, or shortly after, the commission of the assault

with which accused stands charged, and also the duration of the period of recovery.

6 C. J. S., Sec. 123, p. 989.

Bailey v. *State,* 24 Ala. App. 354; 135 So. 407.

Jackson v. *State,* 19 Ala. App. 399; 97 So. 260.

People v. *Lathrop,* 49 Cal. App. 63; 192 P. 722.

Paschal v. *State,* 30 Ga. App. 22; 116 S. E. 899.

State v. *Henggeler,* 312 Mo. 15; 278 S. W. 743.

State v. *Allen,* 246 S. W. 946.

Bone v. *State,* 43 Okla. Cr. 360; 279 P. 363.

Garza v. *State,* 102 Tex. Cr. 241; 277 S. W. 382.

State v. *McDonie,* 89 W. Va. 185; 109 S. E. 710.

State v. *Johnson,* 23 Wash. 2d 751; 162 P. 2d 440, 441.

For the purpose of showing that the weapon used was in fact a dangerous weapon, evidence is admissible to show the nature, character and extent of the injuries inflicted by it and the assault.

6 C. J. S., Sec. 123, pp. 989, 990.

Bone v. *State,* 43 Okla. Cr. 360; 279 P. 363.

People v. *Manning,* 320 Ill. App. 143; 50 N. E. 2d 118, 120.

State v. *Quong,* 8 Idaho 91; 67 P. 491.

State v. *Young,* 53 Or. 227; 96 P. 1067.

In the *Manning* Case, *supra,* the defendant was convicted of assault with a deadly weapon, the weapon being a crank handle. In reversing the case on other grounds, the Court in its opinion stated:

The cause will be remanded and in aid of a new trial we wish to point out that courts in foreign jurisdictions in cases cited, some of which we refer to, approve admitting medical testimony of the extent and the degree of permanency of injuries of the person assaulted. *State* v. *Allen,* Mo. Sup., 246 S. W. 946; *People* v. *Lathrop,* 49 Cal. App. 63; 192 P. 722; *State* v. *Haynie,* 118 N. C. 1265, 24 S. E. 536; *Jackson* v. *State,* 19 Ala. App. 339, 97 So. 260. The theory is that such evidence is admissible to show the weapon used was dangerous and to show also the character of the assault. The reason for the rule would appear to be that the jury cannot know the force of the blow without knowing the effect and the effect here was not alone knocking Caputo to the ground. Likewise, with the jury looking back from the injuries, it can better determine the character of the act, despite the fact that the crank handle itself might be an indication of the character. The injuries following the blow, while not strictly a part of the offense, shed light upon the results of assault with a truck crank handle and afford a fair estimate of the deadliness of the instrument as well as the quality of the intention. These reasons justify the rule and defendant here, judging from the record, was not prejudiced. Since the testimony is admissible, we see no objection to the doctor testifying, in addition to Caputo, to the injuries received. The doctor was better qualified to do so.

Evidence may be introduced to show the nature, character, and extent of the injuries sustained as indicative of the intent with which they were inflicted.

6 C. J. S., Sec. 116, p. 980.

People v. *Manning,* 320 Ill. App. 143; 50 N. E. 2d 118.

State v. *Compton,* 31 S. D. 430, 205 N. W. 31.

A photograph, proved to be a true representation of the person, place or thing which it purports to represent, *is competent evidence of anything for which it is competent for a witness to give a verbal description.* The question of admissibility rests largely in the discretion of the trial court. If a photograph can throw light on the subject of inquiry more clearly than oral testimony could, it may be properly admitted. [Emphasis supplied.]

Madden v. *U. S.,* C. C. A. Cal., 20 F. 2d 289.

Viliborghi v. *State,* 43 P. 2d 210; 45 Ariz. 275.

People v. *Shaver,* 7 Cal. 2d 586; 61 P. 2d 1170.

State v. *Walsh,* 72 Mont. 110; 232 P. 194.

State v. *Williams,* 50 Nev. 271; 257 P. 619.

State v. *Nelson* (Ore.), 92 P. 2d 182.

State v. *Whitzell,* 175 Wash. 146; 26 P. 2d 1049.

23 C. J. S., Sec. 852, pp. 51, 52.

When it is material to the issues, a photograph of deceased, or of his body or parts thereof, is admissible in a prosecuton for homicide, although the picture has a gruesome or shocking aspect and tends to excite the passion or prejudice of the jury; but such photographs should be excluded if they are unnecessary and introduced for the purpose of inflaming

the jury's emotions. It is within the discretion of the trial court to determine whether or not such a photograph is admissible. Photographs of a person deceased, or of a body, have been held admissible for the purpose of identification, or to show the condition of the victim's body, *or to indicate the nature or extent of wounds or injuries.* [Emphasis supplied.]

23 C. J. S., Sec. 852, pp. 53, 54.

Young v. *State,* 38 Ariz. 298; 299 P. 682, 685.

Janovich v. *State,* 32 Ariz. 175; 256 P. 359, 360.

People v. Dunn, 177 P. 2d 553, 556.

People v. *Goodwin,* 9 Cal. 2d 711; 72 P. 2d 551, 553.

People v. *Harris,* 219 Cal. 727; 28 P. 2d 906, 908.

People v. *Ferlin,* 203 Cal. 587; 265 P. 230, 235.

People v. *Russo,* 133 Cal. App. 468; 24 P. 2d 580, 582.

State v. *Dennis,* 177 Ore. 72; 159 P. 2d 839, 858.

State v. *Nelson,* 162 Ore. 430, 92 P. 2d 182, 191.

State v. *Payne,* 25 Wash. 2d 407; 171 P. 2d 227, 231.

State v. *Smith,* 196 Wash. 534; 83 P. 2d 749, 752.

State v. *Eggleston,* 161 Wash. 486; 297 P. 162, 164.

In the case of *Jarabo* v. *U. S.* (C. C. A. 1), 158 F. 2d 509, 513, the Court in its opinion stated in part:

The appellant's present complaint with respect to the admission of evidence is that the

> court below allowed the Government to introduce as physical exhibits a number of pornographic photographs of the type referred to in a summary of the evidence in the second count except that the women appearing in them were not named in any count of the indictment. He says that these photographs of strangers to any charge layed against him were unnecessary, immaterial, and irrelevant, confused the issue, were calculated to "inflame the emotions and passions of the jury" and were so numerous that the court abused its discretionary powers in admitting them. * * *
>
> To be sure, photographs constitute rather more dramatic evidence than oral testimony, and the photographs objected to are numerous and many of them are lurid and revolting. We cannot deny their capacity to incite some prejudice against the appellant. But, nevertheless, considering them in connection with the oral testimony, we are not prepared to say that the court below abused its discretion in admitting them. We cannot say that their prejudicial effect so far outweighs their probative value that as a matter of law they should not have been admitted in evidence.

In the case of *State* v. *Nelson, supra,* in a well considered opinion by the Supreme Court of the State of Oregon sitting *In Banc,* we find the following statement:

> Although a photograph might be prejudicial because of its so-called gruesome character, it is nevertheless admissible in evidence if material to some issue in the case. *State* v. *Weston,* 155 Or. 556, 64 P. 2d 536, 108 A. L. R. 1402;

State v. *Weitzel,* 157 Or. 334, 69 P. 2d 958; *2 Wigmore on Evidence,* Sec. 1157; *Commonwealth* v. *Retkovitz,* 222 Mass. 245, 110 N. E. 293; *State* v. *Gaines,* 144 Wash. 445, 258 P. 508. A photograph of a dead body is properly admitted when it is material for the sole purpose of explaining and demonstrating the testimony of expert medical witnesses. *State* v. *Weston, supra; State* v. *Clark,* 99 Or. 629, 196 P. 360; *Commonwealth* v. *Winter,* 289 Pa. 284, 137 A. 261; *Carmine* v. *Tibbetts,* 158 Or. 21, 79 P. 2d 974. The photograph described in State's Exhibit O is not gruesome or prejudicial. *State* v. *Weston, supra; State* v. *Clark, supra. State* v. *Miller,* 43 Or. 325, 74 P. 658, cited by defendant, has been distinguished and is not in harmony with *State* v. *Weston, supra.* See, also, *State* v. *Finch,* 54 Or. 482, 103 P. 505, and *State* v. *Clark, supra,* where the case of *State* v. *Miller, supra,* is distinguished.

The arguments which defendant presents to the effect that State's Exhibit O was improperly admitted because it was a gruesome photograph, find answer in *State* v. *Weston, supra.* In that case the court, speaking by Mr. Justice Rossman, gave a very complete analysis of the law applicable to so-called "gruesome" exhibits. The opinion and authorities there set forth, it is believed, constitute a clear showing that the court committed no error in the present case in admitting in evidence State's Exhibit O. The defendant's argument rests entirely upon the assumption that error was committed, unless State's Exhibit O was necessary to prove some point in the case, and that since the fact proved by that exhibit was proved by the testimony of

expert witnesses, it was unnecessary. The answer to this contention is that such is not the law, as established in this state, not only by *State* v. *Weston, supra,* but also by other decisions. The rule of law is that exhibits of this character, sometimes known as real evidence, are admissible if they are material as evidence. In *State* v. *Weston* the court enters into a discussion of this particular question. In 155 Or. at page 575, 64 P. 2d at page 543, the court quotes from *Wigmore on Evidence,* 2d Ed., Sec. 1157, to the effect that evidence of this kind should be admitted if material, whether or not there is possible ground for prejudice due to the gruesome character of the exhibit. At pages 575 to 578, the court cites a number of cases involving the propriety of the admission in evidence of photographs of dead bodies. In all of those cases it was held that no error was committed in admitting such photographs where the exhibits were material in the proof of some part of the state's case. The rule is well summarized in a quotation from *Commonwealth* v. *Retkovitz, supra,* where the court said (222 Mass. 245, 110 N. E. 294): "Competent and material evidence is not to be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible." See, also, *State* v. *Gaines, supra,* and *State* v. *Weitzel, supra,* where the court held, without comment, that a photograph was properly admissible in a case of assault with intent to commit rape, the photograph showing the condition of the prosecutrix the morning after the assault.

In *State* v. *Cunningham,* 144 P. 2d 303, 311, Oregon, the court, with reference to *State* v. *Miller,* relied upon by appellant and cited in his brief at pages 30 and 31, stated:

> We have examined both the coat and the shirt. We do not believe that either is gruesome. Nothing connected with a murder trial—guns, bullets, blood-stained clothing—is pleasing to the eye or touch; but the shirt and coat do not provoke sympathy for the deceased nor cry out for reprisal. If either could be deemed gruesome, that circumstance in itself would not have excluded it from reception as evidence. *State* v. *Nelson,* 162 Or. 430, 92 P. 2d 182; *State* v. *Weitzel,* 157 Or. 334, 69 P. 2d 958; *State* v. *Weston,* 155 Or. 556, 64 P. 2d 536, 108 A. L. R. 1402; and *Wigmore on Evidence,* 3rd Ed. Sec. 1157. Those authorities we deem controlling, rather than *State* v. *Miller,* 43 Or. 325, 74 P. 658, upon which the defendant relies. * * *

The transcript of record reflects that plaintiff's exhibits 7, 8, 9, and 10 were admitted for the purpose of showing in part the condition caused by the alleged wound—or the wound suffered by Mr. Rowley from whatever cause (R. 154). With reference to exhibit No. 7, appellant's counsel stated, "The severity of the injury and the operation and all that has nothing to do with this case. *It is material to show the direct results of any blow that might have been struck,* but not to arouse passion and prejudice by photographs of blood and bones." Appellant's counsel is incorrect in his statement that the severity of the injury

had nothing to do with the present case. The nature and exent of the injuries were clearly admissible to show intent, to show the dangerous nature of the implement used and to show the nature and character of the assault. Inasmuch as this evidence was admissible by testimony of witnesses it follows that a photograph on the same subject showing the nature and extent of the injuries was likewise competent. In this connection, it is submitted that Exhibits 7, 8, 9, and 10 afforded the jury a clearer, more lucid description of the location, nature and extent of the injury suffered by Rowley than do the spoken words "a 3¼-inch depressed crescentic shaped laceration of the scalp near the top of the head, lying a little to the right side" (R. 296). These exhibits convey these facts to the jury so ably, and more adequately than words, that there was no necessity to call witnesses to endeavor to describe the injury and the extent thereof.

It is to be noted that plaintiff's exhibits 7, 8, 9, and 10 were admitted into evidence by the Court sometime prior to 5 p. m. on November 5, 1946. The jury retired to consider the verdict at 12:30 p. m. some 9 days later on November 14, 1946. The record reflects that the only time said photographs were exhibited to the jury was at the time of their being admitted into evidence on November 5, 1946. At that time the court very carefully and appropriately cautioned the jury as to the manner in which these exhibits were to be considered. It may be presumed, in the absence of a showing to the contrary, that the jury followed the court's instructions.

Appellant contends that because exhibits 7, 9, and 10 were shown to the jury at the outset of the trial and withdrawn at the close thereof clearly demonstrates that the U. S. Attorney's only purpose in offering the photographs was to excite prejudice and horror in the minds of the jury. To the contrary it appears that the U. S. Attorney took every precaution to avoid the possibility of influencing the jury with exhibits 7, 9, and 10. They were introduced for the legitimate purpose of showing the nature and extent of the injury received by Rowley. After this evidence had been conveyed to the jury the exhibits were withdrawn prior to the jury's retiring to avoid any possibility of appellant claiming that the photographs had influenced the jury during their deliberations.

If, as asserted by appellant, the U. S. Attorney's sole purpose in introducing these photographs was to prejudice the jury, he would have maneuvered to have those photographs flashed before the jury constantly throughout the trial and would have insisted, above everything else, that these photographs be with the jury during their deliberations.

While exhibit 8, which did go to the jury, does not show the extent of the injury, it does show its location. In addition, it is mute evidence of a conclusive nature as to the identity of the implement used. The area in exhibit 8 between the two hemostats is the original ragged wound and was not made by a knife. This crescentic shaped wound is approximately 3¼ to 3½ inches in length (R. 302). A comparison of this 3¼ or 3½ inch crescentic shaped wound with the end of

802610—48——3

the rake, introduced as plaintiff's exhibit 6 (R. 150), reveals that they are nearly identical.

In the case of *Simpson* v. *U. S.,* C. C. A. 9, 289 F. 188, this Court in passing upon the question of the error in admission of evidence claimed to be prejudicial, in an appeal taken from the District Court of the First Division, Territory of Alaska, in its opinion stated as follows:

> In reviewing a judgment in an appellate court the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial; *Rich* v. *United States,* 271 Fed. 566; *Trope* v. *United States,* 276 F. 348; *Hall* v. *United States,* 277 F. 19; *Haywood* v. *United States,* 268 F. 795. In the last case cited, Judge Baker, referring to Act of February 26, 1919, amending Judicial Code Sec. 269 (Comp. St. Ann. Supp. 1919, Sec. 1246), said: "We gather the Congressional intent to end the practice in holding that an error requires the reversal of the judgment, unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he had been denied some substantial right whereby he has been prevented from having a fair trial."

See also:

Maron v. *U. S.,* C. C. A. 9, 18 F. 2d 218, 219.

Lonergan v. *U. S.,* C. C. A. 9,, 98 F. 2d 591, 595.

Allred v. *U. S.,* C. C. A. 9, 146 F. 2d 193, 196.

An impartial consideration of the record reflects that appellee's exhibits 7, 8, 9, and 10 were properly admitted in evidence for a legitimate purpose—that of showing the nature and extent of the injury sustained by Rowley from which the jury could infer the physical condition of Rowley shortly after the assault, the dangerous nature of the weapon used, and the intent with which the assault was made. The trial judge and prosecuting attorney took every reasonable precaution to protect appellant from any possible prejudice that might result thereby. There is no indication that the appellant was prejudiced by the introduction of such photographs.

Fifth point raised: 5. The court did not abuse its discretion in overruling appellant's motion for new trial

The affidavit of the United States Attorney in opposition to appellant's motion for new trial (R. 31–35), which is not controverted, shows that the United States Attorney was not guilty of any misconduct before the grand jury nor was any material evidence improperly withheld.

A motion for a new trial is addressed to the sound discretion of the trial judge. It is well established that error may not be assigned to the trial court's ruling on a motion for new trial.

Rasmussen v. *U. S.,* C. C. A. 9, 8 F. 2d 948, 950.

Freihage v. *U. S.,* C. C. A. 9, 56 F. 2d 127, 135.

Goldstein v. *U. S.,* C. C. A. 9, 73 F. 2d 804, 807.

Sutton v. *U. S.,* C. C. A. 9, 79 F. 2d 863, 865.

Rourbay v. *U. S.,* C. C. A. 9, 115 F. 2d 49, 50.

Utley v. *U. S.*, C. C. A. 9, 115 F. 2d 117, 118.
Banks v. *U. S.*, C. C. A. 9, 147 F. 2d 628, 629.

Sixth point raised: 6. The indictment stated facts sufficient to constitute a crime and the trial court had jurisdiction over the offense charged

(a) The sufficiency of the indictment

When the indictment in the present case is viewed in the light of practical, instead of technical, considerations, the sufficiency thereof becomes apparent. It contains facts which inform appellant that he is accused of the crime of assault with a dangerous weapon with sufficient detail to enable him to prepare his defense and to prevent the appellant from being prosecuted a second time for the same offense.

In *Evans* v. *U. S.*, 153 U. S. 584, 590, the Court stated:

> While the Rules of Criminal Procedure require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty as well as to shield the innocent, and *no impractical standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove.* [Italics supplied.]

In *Melvin* v. *U. S.*, C. C. A. 2, 252 Fed. 449, 456, the Court in its opinion quoted from 2 Hale C. P. 193 as follows:

> More offenders escape by the over-easy ear given exceptions in indictments than by their own innocence and many heinous and crying

> offenses escape by these unseemly niceties to the reproach of the law, to the shame of the government, to the encouragement of villainy and to the dishonor of God.

The following cases are cited to indicate the recent trend with respect to the sufficiency of indictments since the adoption of the Federal Rules of Criminal Procedure.

In *U. S.* v. *Bickford,* C. C. A. 9, 168 F. 2d 26, the lower court held the indictment fatally defective because it did not directly aver that the officer administering the oath had competent authority to administer the same as was specifically required by 18 U. S. C. A., Section 558, under which the indictment was framed. In holding the indictment sufficient and reversing the case this Court stated:

> The criminal rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. Certainly Rule 7 (c) was not intended to be less liberal than is the modern practice of the federal courts to consider the adequacy of indictments on the basis of practical, as opposed to technical, considerations. It has long been settled in the federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the offense with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act. *Hagner* v. *United States,* 285 U. S. 427; *Berger* v. *United States,* 295 U. S. 78; *Hopper* v. *United States,* 9 Cir. 142 F. 2d 181. As observed in *Hagner* v. *United States, supra,* p. 433, *"It is enough that*

the necessary facts appear in any form or, by fair construction can be found within the terms of the indictment." Measured by these standards, the sufficiency of the indictment before us is not open to debate. [Italics supplied.]

In *Ochoa* v. *U. S.*, C. C. A. 9, 167 F. 2d 341, the appellant contended that the indictment was defective because it did not mention malice which is contained in Section 452, Title 18, U. S. C. A., under which the indictment was drawn. The indictment followed literally the form for an "indictment for murder in the first degree of federal officer" contained in the Appendix of Forms to the Federal Rules of Criminal Procedure. In holding the indictment to be sufficient this Court stated:

> The Federal Rules of Criminal Procedure have the effect of law, and Rule 58 thereof gives the Appendix of Forms official illustrative status. *The precision and detail formerly held necessary to charge an offense are no longer required.* See *Lowrey* v. *United States,* 8 Cir., 161 F. 2d 30, 35; *United States* v. *Agnew* (D. C. Penn.), 6 F. R. D. 566. It is provided that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 7 (c). [Italics supplied.]
>
> The precise point presented by appellant appears to be a novel one. In the absence of persuasive authority on the question, we have determined that the indictment is adequate because, in our view, the form employed can be considered to include all the essential facts constituting the offense; it is in harmony with

the spirit and intent of the new criminal rules; and it was prescribed by the Supreme Court, which we must necessarily assume was cognizant of the requirements of the law. Furthermore, there is obviously absent any conceivable element of prejudice to appellant in this respect. The indictment refers to the statutes which were charged to have been violated, Count I being prefaced with the citation of U. S. C., Title 18, Sections 253 and 454. The record disclosed no demurrer to the indictment nor demand for a bill of particulars—an understandable omission, since the only conclusion logically to be drawn from reading the indictment is that it charges the crime of murder in the first degree. Finally, the Court in its instructions to the jury not only explained the several degrees of unlawful homicide, but gave complete and orthodox instructions defining the terms malice and malice aforethought. The issue of malice as an essential ingredient of the crime of murder in the first degree was fully and carefully presented in these instructions.

See also:

Kramer v. *U. S.,* C. C. A. 9, 166 F. 2d 515, 519.

Frederick v. *U. S.,* C. C. A. 9, 163 F. 2d 536, 546.

Fippin v. *U. S.,* C. C. A. 9, 162 F. 2d 128, 131.

Phelps v. *U. S.,* C. C. A. 9, 160 F. 2d 626, 627.

Coagara v. *Territory of Hawaii,* C. C. A. 9, 152 F. 2d 933, 935.

U. S. v. *Josephson,* C. C. A. 2, 165 F. 2d 82, 85.

Newton v. *U. S.,* C. C. A. 4, 162 F. 2d 795, 797.

Kempe v. *U. S.,* C. C. A. 8, 160 F. 2d 406, 408.

Beauchamp v. *U. S.,* C. C. A. 6, 154 F. 2d 413, 415.

(b) The sixth amendment

Appellant has considered it necessary to devote a substantial portion of his brief, pages 35–47 inclusive, in an effort to bolster his interpretation of the meaning of the words of the Sixth Amendment, "the nature and cause of the accusation." From a comparison of that portion of appellant's brief and the oral opinion of the trial court (R. 324–338), it is evident that the trial judge was not laboring under an "apparent misconception" of the meaning of that provision of the Sixth Amendment. To the contrary, it appears that the trial judge was very well informed as to the true meaning of that provision of the Sixth Amendment and his conception is entirely in harmony with the recent decisions of this Court.

The true meaning of the words, "the nature and cause of the accusation," in the Sixth Amendment is accurately and succinctly stated in *Hagner* v. *U. S.,* 285 U. S. 427, 431:

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and "sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Sayer* v. *United States,* 157 U. S.

286, 290; *Rosen* v. *United States,* 161 U. S. 29, 34.

The *Hagner* case has been cited with approval by this Court on numerous occasions. Among these are:

U. S. v. *Bickford,* 168 F. 2d 26.
Kramer v. *U. S.,* 166 F. 2d 515.
Frederick v. *U. S.,* 163 F. 2d 536.
Phelps v. *U. S.,* 160 F. 2d 626.
Hopper v. *U. S.,* 142 F. 2d 181, 184.

In its oral opinion (R. 324–338) the trial court, in addition to the cases of *Hagner* v. *U. S., supra,* and *Hopper* v. *U. S., supra,* made reference to the case of *Myers* v. *U. S.,* C. C. A. 8, 15 F. 2d 977. Appellant contends that the *Myers* case was later, in effect, overruled by the case of *Jarl* v. *U. S.,* C. C. A. 8, 19 F. 2d 891. Assuming this statement is correct, it will be seen that the trial court correctly relied upon the doctrine pronounced in the *Myers* case in view of a recent opinion of the Circuit Court of Appeals for the Eighth Circuit. In *Lowrey* v. *U. S.,* C. C. A. 8, 161 F. 2d 30, 35, the Court expressly repudiated the doctrine of the *Jarl* case, stating:

> Such precision and detail as were held necessary to charge an offense in *Jarl* v. *United States,* 8 Cir., 19 F. 2d 891; *Corcoran* v. *United States,* 8 Cir., 19 F. 2d 901; *Partson* v. *United States,* 8 Cir., 20 F. 2d 127; *Turk* v. *United States,* 8 Cir., 20 F. 2d 129, upon which appellant relies, are no longer required.

This Court cited the *Lowrey* case with approval in *Ochoa* v. *United States,* cited *supra.*

Appellant cites the case of *Lowenburg* v. *United States,* 10 Cir., 156 F. 2d 22, and states that in that

case the Court "gets back to first principles in its opinion." It is significant to note the recent trend of the Circuit Court of Appeals for the Tenth Circuit in respect to the sufficiency of indictments, as reflected in a more recent decision, *Speak* v. *U. S.,* 161 F. 2d 562, 563. The opinion in the *Speak* case was written by Judge Huxman, who also wrote the opinion in the *Lowenburg* case. In the *Speak* case it was claimed that the information failed to state an offense because it was so general and indefinite that it failed to apprise appellant of the exact nature of the offense with which he was charged. In holding that such contention was without merit, the Court quoted Rule 7 (c) of the Rules of Criminal Procedure and stated:

> We fail to see what more could have been set out, but, in any event, if there were any details to which appellant was entitled, the lack thereof did not go to the validity of the information. That could have been furnished, if requested, by a bill of particulars.

Appellant relies implicitly upon the case of *Sutton* v. *U. S.,* 5 Cir., 157 F. 2d 661. The holding in that case can be distinguished from the present case in that it was there held that the indictment failed to charge an essential element of the offense. This circumstance is not to be found in the present case. In the *Sutton* case the Court stated:

> Turning to the information, we note that at a certain time and place the appellant had in his possession and under his control 10,000 pounds of sugar, the same being a rationed commodity. The mere possession or control of rationed sugar is not a federal offense, and yet

> the information charges no other fact unless the following words constitute an allegation of fact: "in violation of second revised Ration Order No. 3 and General Ration Order No. 8, as amended." The phrase just quoted is not an allegation of fact but a legal conclusion of the pleader; it constitutes no part of the description of the offense.

In the *Sutton* case the facts alleged could have been either lawful or unlawful depending on other facts not alleged. It is, of course, recognized that it is not sufficient to charge an offense in the language of the statute alone, where by its generality it may embrace acts which it was not the intent of the statute to punish or which may or may not constitute a crime.

In the present case the indictment charges that Z. E. Eagleston, "being then and there armed with a dangerous weapon, to wit, a long handled implement, a more exact description of said long handled implement being to the grand jury unknown and therefore not stated, did then and there wilfully, feloniously, and unlawfully make an assault upon another, to wit, Frank Rowley, with said long handled implement by then and there striking, beating, and wounding the head of the said Frank Rowley with the said long handled implement, * * *." The facts here alleged are set forth in such detail that, if proven, the accused could not be innocent.

Appellant has failed in any part of his brief to point out specifically which "essential element" of the crime of assault with a dangerous weapon is omitted in the indictment. Nor has he advanced any specific designation as to how he was misled, uninformed, or

unprepared for trial. The essential element of the crime charged is that an assault was made with a dangerous weapon and the indictment in the present case sufficiently alleges this essential element.

(c) It is presumed that the defendant is innocent of what is intended to be proved against him

Assuming the truth of the above statement, it would seem that in the present case it may also be presumed that the indictment adequately informed the appellant of the nature and cause of the accusation sufficiently to enable him to prepare his defense. Since appellant did not move against the indictment and at no time requested additional details or information, it is only logical to assume that from the indictment he knew precisely what he had to meet. The bill of particulars which was supplied appellant on November 8, 1946 (R. 45) was supplied by the Court *sua sponte* and not upon the request of appellant.

In *Ochoa* v. *U. S., supra,* this Court stated:

> The record disclosed no demurrer to the indictment nor demand for a bill of particulars—an understandable omission since the only conclusion logically to be drawn from the indictment is that it charges the crime of murder in the first degree.

In *Dunbar* v. *U. S.,* 156 U. S. 185, 191–192, the Court stated:

> Further, no objection was made to the sufficiency of the indictments by demurrer, motion to quash, or in any other manner until after the verdict. While it may be true that a defendant, by waiting until that time, does not

> waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which are run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn. If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defense, he should raise the question by some preliminary motion or perhaps by a demand for a bill of particulars; *otherwise it may properly be assumed, as against him, that he is fully informed of the precise property in respect to which he is charged to have violated the law.* [Italics supplied.]

Nothwithstanding appellant's asserted claim of ignorance, the record reveals that no substantial right of the appellant was actually prejudiced thereby. The record reflects that appellant knew from the 30th day of July 1946, that the implement with which appellant assaulted Rowley was either a shovel or rake (Plaintiff's exhibit 15–R. 345). The record also discloses that a preliminary hearing was held at which several witnesses, including Dr. Romig, David Foote, and Louis Strutz, testified. The cross-examination of witness Strutz (R. 260–285) and the re-cross-examination (R. 287–290) reflect that at such preliminary hearing appellant's counsel went to great length in an effort to ascertain the exact description of the implement used. Apparently the information thus obtained was sufficient, since appellant did not subsequently assert a lack of information until during the progress of the trial. The reporter's transcript of

testimony, which was made by a secretary of one of appellant's counsel, was available at all times approximately one week after the date of the preliminary hearing (R. 354).

Appellant's personal physician was the second physician to examine Rowley on the morning of July 30, 1946, and upon his orders X-rays were made of Rowley's head (R. 378–379). At the trial of the case he testified at length in regard to the nature and extent of the injury on Rowley's head and the cause thereof (R. 367–383). Inasmuch as Eagleston had requested Dr. Davis to attend Rowley and had stated that he would pay him for his services (R. 378), there can be little doubt that appellant knew with great detail the exact extent and nature of the injury received by Rowley within a short time after such wound was inflicted.

In this connection it seems appropriate to note the language of the Court in *U. S.* v. *Lynch,* 11 F. 2d 298, 300:

> Undoubtedly neither the district attorney nor the grand jury is required to allege facts which are unknown, especially such as should be from the very circumstances of the case best known to the accused.

(d) An indictment pleading only the words of the statute is sufficient in the case at bar

Although appellant contends that an indictment pleading only the words of the statute is not sufficient, this Court in *Jackson* v. *U. S.,* 102 Fed. 473, 483–484, in determining the sufficiency of an indictment drawn under this identical statute, held that charging the

crime in the language of the statute was generally sufficient.

> Under this assignment we will notice the point, previously urged, that the indictment does not state facts sufficient to constitute a crime, as well as the points suggested as to the insufficiency of the evidence. The indictment was drawn under the provisions of section 536 of the Oregon Code, which reads as follows: "If any person, being armed with a dangerous weapon, shall assault another with such weapon, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than ten years, or by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than one hundred nor more than one thousand dollars."

The charging part of the indictment reads as follows:

> The said Turner Jackson, at or near Skaguay, within the said district of Alaska, and within the jurisdiction of this court, on the 8th day of July in the year of our Lord 1898, being then an there armed with a dangerous weapon, to wit, a revolver charged with gunpowder and leaden bullets, and with which a mortal wound could be inflicted, did unlawfully and feloniously assault one Josias M. Tanner with said revolver, by pointing the same towards and at him, the said Josias M. Tanner, and threatening him, the said Josias M. Tanner, therewith, with the intent then and there and thereby to assault with said dangerous weapon the said Josias M. Tanner by so doing as aforesaid.

The words relating to the intent with which the weapon was drawn need not have been used and may be treated as surplusage, although as used they are not objectionable. The law is well settled that congress or the legislature of a state or territory may enact laws for the violation of which, irrespective of the criminal intent, punishment and penalty are attached. *It is the act itself, the doing of which constitutes the crime. The charging part of the indictment substantially charged the crime in the language of the statute, and this is generally held to be sufficient.* But the provisions of Hill's Ann. Laws Or. Section 1279, in addition to the provisions heretofore cited, declare that the indictment is sufficient if it can be understood therefrom: "(6) That the act or omission charged as the crime is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. (7) That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case." [Italics supplied.]

This taken in connection with the statute defining the crime, makes it perfectly clear that the indictment in the present case states facts sufficient to constitute the crime charged. It is too clear for argument that the facts are stated in such a manner as to enable a person of common understanding to know what was intended, and with such a degree of certainty as to enable the court to pronounce judgment. The essential element of the crime charged was the assault

made by Jackson upon Tanner with a dengerous weapon.

Appellant further contends that if the weapon used was a dangerous weapon, per se, then no further description is necessary, but that where the weapon alleged to have been used is not dangerous, per se, then a sufficient description of such weapon, the manner of its use and effect produced thereby should be set forth in the indictment. This Court did not draw such a distinction in the *Jackson* case nor is such a contention sustained by other authorities. It may be generally stated that the dangerous character of the weapon and the effects produced thereby are matters of proof or evidence and need not be alleged.

In *State* v. *Sims,* S. Ct. Miss., 31 So. Rep. 906, the appellant was indicted for assault and battery with intent to kill and murder. The weapon was described as a certain deadly weapon, to wit, a brick. A demurrer to the indictment was sustained and on appeal counsel for appellee urged the invalidity of the indictment. In reversing and remanding the cause the Court stated:

> The counsel as we understand him, insists that the manner in which the brick was used should be set out; but we see no more reason for such an allegation than would exist in the case of an axe, hoe, pistol, or other lethal weapon. Where the offense is committed with a deadly weapon, not prescribed by statute, no more particularity of statement is necessary than when it is committed by the use of a weapon declared deadly by statute.

In *Canterbury* v. *State,* S. Ct. Miss., 43 So. Rep. 678, the Court stated:

> Concerning the contention that the indictment should charge the specific weapon with which the assault and battery was committed, and that it was not sufficient to charge that it was committed with a deadly weapon, we merely observe, first that we have examined carefully all the authorities cited by the learned counsel for appellant and find that they do not sustain the contention; * * *.

In *People* v. *Weir,* C. A. 1st Dist. Cal., 102 P. 539, the information alleged an assault to have been made upon the person of one G. Brocks by the defendant with a certain deadly weapon, to wit, a large shovel. The defendant contended that the information did not state facts sufficient to constitute a crime in that the words, "a large shovel" were too indefinite to show that the instrument described was, in fact, a deadly weapon. The Court stated:

> In the case at bar the offense is stated to have been committed with a "deadly weapon," and, as the term "deadly weapon" has a well-recognized meaning, it was sufficient to use that term in the indictment without further description of the particular instrument employed. The cases in this state so hold.
>
> In *People* v. *Savercool,* 81 Cal. 650, 22 Pac. 856, the defendant was charged with "an assault with a deadly weapon, to wit, a revolver"; and there it was said: "Examining the information, we find that it follows the language of that section. This is all that is necessary. The ultimate or issuable facts which the statute de-

clares to constitute the offense are to be pleaded substantially in the language of the law, while probative facts, such as the intent with which an assault is made, and the 'present ability' to do it, must be proved, but need not be alleged in the information or indictment"—citing cases. "It being charged that the assault was made with a 'deadly weapon,' as the statute prescribes, it was unnecessary to have described it further as 'to wit, a revolver,' as was done. The kind of weapon was a matter of proof only." In *People* v. *Congleton,* 44 Cal. 92, it is said that an indictment for an assault with a deadly weapon with intent to do bodily injury to another may in general terms aver the assault to have been made "with a deadly weapon"; that in so doing it would but follow the language of the statute by which the offense itself is defined. In *People* v. *Perales, supra,* the Supreme Court say: "The term 'deadly weapon' has a precise, well-recognized meaning, and the nature of such weapon as being one likely to produce great bodily harm is well understood. It is expressly declared by the statute a specific means, the use of which in making an assault shall constitute an offense, and therefore, under the general rule, an assault with it may be pleaded in the language of the statute." It thus clearly appears that the information is sufficient and proper in form. The only effect of the words "a large shovel" in the information was to confine the prosecution to proof that the assault was made with the instrument described, and not with some other. *People* v. *Savercool, supra; People* v. *Carson* (Cal.) 99 Pac. 970.

In *People* v. *Oppenheimer,* 156 Cal. 733; 106 Pac. 74, 78, the Court stated:

> The information failed to specify the nature of the deadly weapon with which the assault was alleged to have been committed, alleging simply that it was done with a "deadly weapon," which is the language of the statute. This was a sufficient allegation.

In *People* v. *Petters,* Dist. Ct. App., 1st Dist., Cal., 84 P. 2d 54, appellant was convicted of assault with a deadly weapon. He contended that the trial court was "without jurisdiction over the subject of the information" and that the trial court therefore erred in denying his motion in arrest of judgment. His contention was that the information was insufficient to charge an assault with a deadly weapon under Section 245 of the Penal Code as the instruments named, to wit, a wooden club and a knife with an open blade, were not instruments defined as "deadly weapons" in Section 1168, Subdivision (2), Subsection (e) of the Penal Code. The Court in its opinion stated:

> We are therefore of the opinion that the pleading was sufficient to charge the commission of a felony under Section 245. Furthermore, it has been held at least in the absence of a demurrer to the information that it is sufficient to charge an assault with a deadly weapon in the terms of the statute without specifying the nature of the weapon used.

In *People* v. *Macias,* Dist. Ct. App., 3d Dist., Cal., 174 P. 2d 895, 899–900, appellant was convicted of assault while armed with a deadly weapon. The information alleged the deadly weapon to be "a wooden

club." Appellant contended that a wooden club is not a deadly weapon as a matter of law and that there being no allegation concerning the manner in which the club was used, the information was insufficient. He further contended that a club is a deadly weapon only under particular circumstances, and that the information failed to allege any such circumstances. The Court in its opinion stated:

> Section 952 of the Penal Code, as it now reads, after amendment in 1927 and 1929, provides that in charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.

In *Garza* v. *U. S.,* C. C. A. 5, 159 F. 2d 413, 414, the appellant was convicted upon indictment which charged a violation of Title 18, Sec. 254, U. S. C. A. Omitting formal parts, it alleged the commission of an assault upon an inspector of the Bureau of Customs of the United States Treasury while engaged in, and on account of the performance of his official duties. There was no demurrer to the indictment, no motion to quash, and no motion for bill of particulars, in the trial court. On appeal only one point was raised which dealt with the sufficiency of the court's charge

to the jury. On oral argument the sufficiency of the indictment was questioned and the court therefore considered both points. In its opinion the Court stated:

> We find no defect in the indictment. It alleges the offense in the language of the statute, which is sufficient, where, as in this case, the words of the statute contain all the essential elements of the offense. *United States* v. *Carl,* 105 U. S. 611, 26 L. Ed. 1135. It was not necessary for the indictment to contain a definition of the word assault which has a fixed and determined meaning in law. *Norris* v. *United States,* 5 Cir., 152 F. 2d 808. The defendant was fully informed of the nature and cause of the accusation against him and even if the indictment were defective in the matter of form it would be of no avail on appeal. 28 U. S .C. A. Sec. 391.

In *Tatum* v. *U. S.,* Dist. Ct. App. D. C., 110 F. 2d 555, the appellant was convicted of assault with a dangerous weapon on an indictment that she "did make an assault in and upon Dorothy M. Ragland, and * * * did maim and disfigure and that the said Carrie A. Tatum, in making the assault aforesaid did cast and throw on and upon the said Dorothy M. Ragland a certain corrosive liquid compound, commonly called lye." The code of the District provides that "every person convicted * * * of an assault with a dangerous weapon shall be sentenced to imprisonment for not more than ten years." In affirming the conviction the Court stated:

> The question is whether the indictment supports the conviction. We think it does. An indictment which "contains the elements of the offense intended to be charged," shows what the defendant must be prepared to meet, and precludes later prosecution for the offense, is good although it does not precisely follow the language of the statute.

In *Sparks* v. *U. S.,* C. C. A. 6, 90 F. 2d 61, 62, the appellant was convicted on each of four counts of an indictment which charged, in substance, that he assaulted and attacked, forcibly intimidated, obstructed, and used deadly weapons in resisting a deputy United States marshal while such deputy marshal was engaged in the performance of his official duties. The first of two questions presented on appeal was whether the indictment was defective. In its opinion, the Court stated:

> The first question was preserved for review by demurrer, which was overruled by the District Court. We deem it unnecessary to consider at length the objection that the indictment is vague and uncertain. It enables the accused to know the nature and cause of the accusation, and to plead the judgment in bar of further prosecution for the same offense. It therefore is sufficient.

In *People* v. *Moore,* App. Ct. Ill., 57 N. E. 2d 511, 512, the appellant was convicted of assault with a deadly weapon with intent to do a bodily injury. The information charged that defendant "did wilfully and unlawfully assault Pvt. Arthur Washburn with a deadly weapon, to wit, with the tines of a pitch fork,

with intent to inflict upon said Washburn a bodily injury where no considerable provocation appeared and where the circumstances of the assault showed an abandoned and malignant heart, contrary to the statute," etc. In holding the information sufficient the Court stated:

> The information was in the language of Paragraph 60 of the Criminal Code, Ch. 38, Rev. Stats. 1943, and in our opinion sufficiently charged the crime defined in such paragraph of the statute.

In *State* v. *Maggert,* S. Ct. Mont., 209 Pac. 989, 990, defendants were convicted of assault in the second degree upon an information filed in the District Court of Pondra County, charging them with the crime of assault in the first degree. The information charged the deadly weapon to be an instrument about a foot long with a knob on the striking end. The judgment of the lower court was affirmed, notwithstanding defendants' contention that the information was insufficient, in that the "deadly weapon" was not sufficiently described; that the words "an instrument about a foot long with a knob on the striking end" did not show that the weapon described was, in fact, a deadly weapon.

In *Alyea* v. *State,* S. Ct. Neb., 86 N. W. 1066, the appellant was tried upon an information charging him with making felonious assault. In sustaining the sufficiency of the information the Court stated:

> The information was framed under Section 16 (b) of the Criminal Code and charged the offense in the language thereof. But it is

> strenuously insisted that this is insufficient, since the Act creating the offense designates no particular fact or facts in defining the offense. Further, the particular facts constituting the assault should have been set forth in the information. The precise question now urged upon our attention was passed upon adversely to the contention of the learned and distinguished counsel for the prisoner in *Murphey* v. *State,* 43 Neb. 38, 61 N. W. 491; and *Smith* v. *State,* 58 Neb. 531, 78 N. W. 1059. It was ruled in those cases that in a prosecution under Section 17 (b) of the Criminal Code the information is sufficient which charges the offense in the language of the statute. The information in the case at bar follows the wording of the statute, and under those decisions which we adhere to, is sufficient in substance.

In *State* v. *Knight,* 289 Pac. 1053, 1054, the Supreme Court of Oregon sitting *In Banc* sustained a conviction of assault with a dangerous weapon under an indictment which alleged the dangerous weapon to be "a hardwood, leaded cane or walking stick."

In *Castillo* v. *State,* Court of Criminal Appeals of Texas, 124 S. W. 2d 146, the defendant was convicted of aggravated assault. His only contention on appeal was that the Court erred in declining to sustain his motion to quash the complaint and information on the ground that it was insufficient to charge the offense for which he was convicted. The information charged that an aggravated assault was committed by "striking and cutting Ignacio Cruz with a sharp instrument, the name thereof being unknown to your affiant." The Court stated:

> We are of the opinion that the complaint and information based thereon are sufficient to charge the offense, see Sec. 1581, Branc's Ann. P. O., 931. The State was not required to plead its evidence. A satement of the facts constituting the offense is sufficient.

From the foregoing authorities it is readily apparent that an indictment charging assault or assault with a dangerous weapon is sufficient if it follows the language of the statute.

(e) The United States attorney did not withhold evidence from the grand jury to the prejudice of the defendant, and the indictment returned was valid and sufficient in every respect

It is a settled rule at common law that when matters or things which are ordinarily proper or necessary to be alleged are, in fact, unknown to the grand jury or the prosecuting attorney, they may properly be so alleged in the indictment or information.

Frisbie v. *U. S.*, 150 U. S. 160.
Coffin v. *U. S.*, 156 U. S. 432.
Jewett v. *U. S.*, 100 Fed. 832.

Where the manner and means of committing an offense or the instrumentality by which it was committed are unknown to the grand jury, it may be so alleged in the indictment, provided the indictment directly and fully charges the accused with the commission of the offense.

St. Clair v. *U. S.*, 154 U. S. 134.
Jewett v. *U. S., supra.*
Alvarado v. *U. S.*, C. C. A. 9, 9 F. 2d 385.

Appellant does not contend that a more exact description of the long-handled implement was known to the grand jury but does contend that the grand

jury was prevented from ascertaining the exact description of the implement by the fact that the witness Miles was not called to testify before that body. Appellant contends that had Miles testified, the grand jury could have named the instrument and, further, that Miles' testimony had to do with an essential element of the crime, namely, the dangerous character of the weapon used.

It is difficult to perceive that Miles' testimony, to any extent, touched upon the dangerous character of the weapon used. Whether the weapon used was a shovel, rake, or other long handled implement, the dangerous nature of such weapon would be a matter to be determined by the trial jury from the manner in which it was used.

As stated by appellant, "All the testimony of the government, including that of Miles, was available to it from July 30, 1946, the date of the alleged offense, to the time of the trial" (Appellant's Brief, p. 73). A consideration of all such testimony reflects that there was no unanimity of opinion on the part of government witnesses as to the implement used by Eagleston. Numerically, the testimony of the witnesses tended to show the implement was a shovel. Miles was the only witness who definitely stated that the implement was a rake. Foote, an eye witness, testified that no blow was struck, and Strutz, an eye witness, testified that it was either a shovel or rake.

The United States Attorney quite candidly admits that, after a thorough consideration and comparison of the oral statements of various government witnesses regarding the implement used, instead of ar-

riving at a definite conclusion he was in a quandry. Although the rake, shovel, and small piece of steel had been transmitted to the Federal Bureau of Investigation laboratory for tests in an effort to establish the identity of the implement used by Eagleston, no report had been received at the time the indictment was drafted and the matter submitted to the grand jury. Subsequent to the adjournment of the grand jury, and prior to the trial, a laboratory report from the Federal Bureau of Investigation was received stating the small piece of steel had been consumed in testing and that no conclusion had been reached. Every possible effort was made to determine the exact nature of the implement used. However, it was not until approximately 12:30 on November 5, 1946, the first day of the trial, that the United States Attorney, upon the basis of an experiment performed in his presence, came to the conclusion that the implement used must have been a rake.

In view of the fact that the United States Attorney had been unable to determine which of the two implements had been used by Eagleston, prior to the time the grand jury convened, he considered it necessary, in the interests of justice, to draft an indictment under which the possibility of a fatal variance could be avoided. The allegation that a more exact description of the implement was unknown was a truthful one and was based solely upon necessity. Contrary to appellant's assertion, this allegation was not made for the purpose of withholding evidence from the appellee to gain an unfair advantage nor for the purpose of surprise.

At the request of certain members of the grand jury, the United States Attorney did cause the witness Miles to be summoned to the Federal Building to testify before that body. A majority of the grand jury elected not to hear additional witnesses. That decision was made by the members of that body during the absence of the United States Attorney from the grand jury room. Upon the conflicting testimony indicated by the record it was no more the duty of the United States Attorney to compel the grand jury to hear the testimony of Miles than it was that he insist that they hear the testimony of all the witnesses at the trial. Assuming that this had been done, the grand jury would have been in no better position to reconcile such conflicting testimony than was the United States Attorney, and the indictment would nevertheless have been returned in exactly the same language. It seems only logical to assume that the members of the grand jury might have drawn different conclusions from the testimony, even though Miles had testified, and consequently still have been unable to have arrived at a definite conclusion as to the implement used.

Appellant, after hearing all the testimony, including that of Miles, is apparently not now convinced that the implement was a rake and has arrived at the conclusion that, "there is an abundance of evidence substantiating appellant's position that Rowley's injuries resulted from a fall into the wood pile while he was sparring with appellant" (Appellant's Brief p. 7).

At the trial of the case appellant called witnesses for the specific purpose of convincing the jury that

Miles' reputation for truth and veracity in the community was uniformly bad (R. 391, 392). Inconsistent with that action, it is now asserted that the United States Attorney committed prejudicial error by not placing complete reliance upon the testimony of such a person and in not compelling the grand jury to return an indictment predicated solely upon his testimony in disregard of the testimony of other witnesses whose credibility was not attacked.

Upon the basis of the testimony disclosed at the trial of the case it would appear that had the grand jury specified a particular implement, they would have alleged the instrument to be a shovel, as did the attorneys who represented Rowley in his $55,000 damage suit against Eagleston (R. 185–188). Had this been done and, on the trial, it had been established that the implement was a rake and a judgment of acquittal had been entered upon the ground of a fatal variance, appellant would then have been satisfied that he had received a fair and impartial trial and that justice had prevailed.

Appellant's statement that "not until late in the trial of the case, was appellant apprised of the true nature of the evidence against him," is typical of numerous unfounded assertions contained in his brief. The record discloses that appellant was aware of the so-called "hidden evidence" against him from the 30th day of July 1946, and was specifically advised that the implement used was a rake on November 5, 1946, the first day of the trail. He was not put upon his defense until November 12, one week thereafter. During this interval the Court was recessed for four days.

It would seem this would have been ample to have enabled appellant to have adequately prepared his entire case.

Upon the facts known to the United States Attorney and the grand jury at the time it was in session, it was the duty of the United States Attorney to prepare an indictment alleging that the exact nature of the implement was unknown, inasmuch as that allegation truly reflected the facts. In view of the contrarity of testimony of the various witnesses it was clearly the duty of the United States Attorney to have drafted the indictment as he did to avoid the possibility of a fatal variance.

CONCLUSION

I

The trial court's instructions, when considered as a whole, correctly stated the law of the case, and were fair to the defense.

II

Photographs of Rowley's head were properly admitted for a legitimate purpose and appellant was not prejudiced thereby.

III

The indictment sufficiently charges the crime of assault with a dangerous weapon.

(a) The appellant was sufficiently informed of the nature and cause of the accusation within the meaning of the Sixth Amendment.

(b) The alleged "dangerous weapon" was described with as great a degree of particularity as was possible under the facts of the case.

(c) The exact nature of the alleged "dangerous weapon" was not known to the United States Attorney at the time the indictment was returned. The grand jury would not have been in a position to have definitely named the implement used even though they had heard every witness who testified in the trial of the case. The record does not reflect, nor has appellant pointed out, just how he was misled, uninformed or unprepared for trial.

The words of Judge Garrecht, in *Phelps* v. *U. S.*, 160 F. 2d 626, are highly appropriate in the present case,

> It was to cover cases precisely like the present, in which a convicted defendant seeks to escape condign punishment by raising technical objections, that Rule 52 (a) of the new Federal Rules of Criminal Procedure, 18 U. S. C. A., following section 687, was promulgated:
>
> "Any error, irregularity or variance which does not affect substantial rights shall be disregarded."

The indictment states facts sufficient to inform the defendant of the offense of assault with a dangerous weapon and its allegations are sufficiently certain to safeguard him from a second prosecution for the same act. Appellant's substantial rights were carefully safeguarded at all stages of the trial.

There appears to have been no error, prejudicial or otherwise, in the trial of the case, and no grounds for

a reversal of the judgment. The appellant was given a fair and impartial trial, and was found guilty of the crime with which he was charged by a jury of his peers under proper instructions and upon competent and sufficient evidence. No reason exists for upsetting the verdict of the jury, and the judgment of conviction should be affirmed.

Dated, Anchorage, Alaska, August 10, 1948.

Respectfully submitted.

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